

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

JOCELYNNE FALLGATTER and)	
JEFF KIRKMAN,)	Case No. 06-3-0003
)	
Petitioners,)	<i>(Fallgatter V)</i>
)	
v.)	
)	ORDER DENYING
CITY OF SULTAN,)	RECONSIDERATION
)	
Respondent.)	
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I. BACKGROUND

On June 29, 2006, the Board issued its Final Decision and Order in this case, finding the City non-compliant with the GMA in regards to Legal Issues 1, 2, 3, and 7. The Board remanded these issues to the City with a 12-month compliance schedule. The Board's FDO did not discuss whether the identified non-compliance substantially interfered with the goals of the Growth Management Act or rule explicitly on Petitioners' request for the remedy of invalidity.

On July 10, 2006, the Board received Petitioners' Motion to Reconsider Final Decision and Order, requesting a ruling of invalidity. **[Fallgatter Motion]**

On July 17, 2006, the Board received the City's Answer to Motion for Reconsideration. **[City Answer]**

II. DISCUSSION

WAC 242-02-832 - Reconsideration - provides:

(1) After issuance of a final decision any party may file a motion for reconsideration with a board in accordance with subsection (2) of this section. Such motion must be filed within ten days of service of the final decision. The original and three copies of the motion for reconsideration shall be filed with the board. At the same time, copies shall be served on all parties of record. Within five days of filing the motion for reconsideration, a party may file an answer to the motion for

reconsideration without direction or request from the board. A board may require other parties to supply an answer. All answers to motions for reconsideration shall be served on all parties of record.

(2) A motion for reconsideration shall be based on at least one of the following grounds:

- (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
- (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
- (c) Clerical mistakes in the final decision and order.

(3) In response to a motion for reconsideration, the board may deny the motion, modify its decision, or reopen the hearing. A motion is deemed denied unless the board takes action within twenty days of filing the motion for reconsideration. A board order on a motion for reconsideration is not subject to a motion for reconsideration.

(4) A decision in response to the petition for reconsideration shall constitute a final decision and order for purposes of judicial review.

Positions of the Parties.

Petitioners state that the Legal Issues in their Petition for Review were “specifically framed ... to address whether or not the City’s actions or failure to act ‘substantially’ interfered with the goals of the GMA” and that they specifically requested a ruling of invalidity as a remedy. Fallgatter Motion, at 2. Petitioners cite three grounds for an order of invalidity:

1. The City’s population projections in its water and sewer plans “used erroneous numbers issued by the wrong entity,” citing *Bremerton, et al v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order (Oct. 9, 1995) (“because the Plan as adopted uses projections for the wrong year made by the wrong entity, all sections of the capital facilities element will have to be revised to correspond to OFM’s projections”). *Id.* at 3.
2. Implementation of the 2004 update of the Sultan Comprehensive Plan cannot be achieved without updating the development regulations, which at present implement the 1994 Comprehensive Plan. Critical Areas Ordinance updates are of particular urgency, otherwise projects will vest to outdated regulations. *Id.* at 2-4.
3. A non-compliant TIP cannot guide capital budget decisions. *Id.* at 4.

The City responds that the Petitioners have not identified any error of fact, law, or procedure that would provide a basis for reconsideration under WAC 242-02-832; therefore the motion should be denied. City Answer, at 2. Further, citing the statutory

basis for a Board determination of invalidity – RCW 37.70A.302(1) – the City raises the following three objections to invalidity in this case.

1. The Board has no authority to declare a City’s Water System Plan, General Sewer Plan, or Six-Year Transportation Improvement Program invalid because these documents are not “a comprehensive plan or development regulation” subject to invalidity under RCW 36.70A.302(1). *Id.* at 2-3.
2. While the Water Plan, Sewer Plan, and TIP may use differing population projections or identify different projects than the City’s Comprehensive Plan, there has been no showing, and the Board has entered no findings, of substantial interference with GMA goals. *Id.* at 3.
3. Failure to complete the update of the City’s development regulation is not grounds for holding the current regulations invalid. *Id.* at 4.

Board Discussion

The Board has considered the briefs of Petitioners and Respondent and finds no new facts or arguments that were not already considered in the Board’s Final Decision and Order.

The GMA’s Invalidity Provision, RCW 36.70A.302, provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board’s order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board’s order by the county or city or to related construction permits for that project.

As Petitioners recognize, the Board has held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. In this case, Petitioners expressly requested the remedy of a Board order of invalidity.

In the discussion of Legal Issues 1, 2, and 3 in the Final Decision and Order here, the Board found and concluded that the City of Sultan's adoption of its TIP, Water System Plan and General Sewer Plan was inconsistent with its 2004 Comprehensive Plan, was clearly erroneous, and did not comply with RCW 36.70A.120 and .035, .140, and .130.¹ The Board remanded these Ordinances with direction to the City to take legislative action to comply with the goals and requirements of the GMA as set forth in the Board's Final Decision and Order. With respect to Legal Issue 7 concerning the incomplete process for updating development regulations, the Board entered an Order of Non-Compliance – Failure to Act – and set a compliance schedule.²

A Board *may* enter an order of invalidity upon a determination that the continued validity of a non-compliant city or county enactment substantially interferes with fulfillment of the goals of the GMA. RCW 36.70A.302(1)(b).³ In this case, Legal Issues 1, 2, and 3 present plans for capital projects that are not properly integrated with the Comprehensive Plan and so do not comply with the GMA. However, there was no showing in the case, nor is there any in the motion for reconsideration, that the City's action on any particular project during the compliance period is likely to thwart the goals of the Act. Indeed, the City has indicated its intent to update the various plans in the near term, to achieve GMA consistency.

Similarly, with respect to Legal Issue 7, the City acknowledges that it is under a mandate to finish updating its development regulations. The need for this update having been acknowledged, the Board presumes the work will move forward, that the City will adopt and follow an appropriate public participation process, and that consistency with the Comprehensive Plan and CFP in their annual review cycles will be achieved. The remedy of invalidity is not applicable.

Accordingly, the Board did not enter an order of invalidity in the FDO and declines to do so upon reconsideration. The Request for Reconsideration is **denied**.

III. ORDER

Based on the GMA, Board rules, Petitioners' Motion to Reconsider, City's Answer to Motion for Reconsideration, the Final Decision and Order in this matter, and prior decisions of this Board, and having deliberated on the matter, the Board enters the following Order:

- Petitioners' Motion to Reconsider Final Decision and Order and to grant the remedy of invalidity is **denied**.

¹ See, Final Decision and Order, (June 29, 2006) at 18-19.

² *Id.* at 21-23.

³ Invalidity is most often invoked to prevent the vesting of development projects to city or county enactments that are not compliant with the GMA.

So ORDERED this 24th day of July, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order, as specified by RCW 36.70A.300⁴.

⁴ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832(3), a board's order on a motion for reconsideration is not subject to a motion for reconsideration.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5).